85-278

No. ____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

Terrell Don Hutto, Individually and as State Corrections Commissioner, A.L. Lockhart, Individually and as Superintendent of the Arkansas Department of Corrections - Cummins Unit, Jerry Campbell, Individually and as Assistant Superintendent of the Department of Corrections - Cummins Unit, Marshall N. Rush, W.L. Curry, Lynn Wade, Thomas Worthen and Richard Griffin, Individually and as Members of the Board of Correction of the Arkansas Department of Corrections, ... *Petitioners*

V.

Johnny Jones and Huey Davis, III, Et Al. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE EIGHTH CIRCUIT ERRED IN FINDING THAT THE DISTRICT COURT WAS CORRECT IN CERTIFYING THIS CASE AS A CLASS ACTION, IN REFUSING TO DECERTIFY THE CLASS, AND IN THE SCOPE AND BREADTH GIVEN TO THE CERTIFIED CLASS.

II. WHETHER THE EIGHTH CIRCUIT ERRED IN ITS INTERPRETATION OF *GRIGGS V. DUKE POWER CO.* AND IN ITS AFFIRMANCE OF THE DISTRICT COURT'S APPLICATION OF A DISPARATE IMPACT THEORY TO THE FACTS OF THIS CASE.

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V.

Johnny Jones and Huey Davis, III,
Et Al. ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-captioned Petitioners hereby petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, filed on June 5, 1985, is reported at 763 F.2d 979 (8th Cir. 1985), and is reprinted as Appendix A to this Petition. The

Memorandum Opinion and Order of the United States District Court is unreported, and is reprinted as Appendix B to this Petition. It is case number PB-74-C-173.

JURISDICTION

The judgment of the Court of Appeals was filed on June 5, 1985. The Court of Appeals entered an Order on July 1, 1985, in which it stayed the issuance of its mandate for a period of thirty (30) days, until July 31, 1985. On July 24, 1985, Petitioners filed a Motion requesting the Court of Appeals to extend said Stay for an additional twenty (20) days, until August 20, 1985. This Motion was granted on July 31, 1985. No Petition for Rehearing was filed in this case. The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1). The parties listed in the caption to this proceeding are all the parties involved in the case before the Eighth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e, *et seq.* (Title VII of the Civil Rights Act of 1964) provides in pertinent part:

> 2000e-2(a). It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

On May 8, 1974, Johnny Jones and Huey Davis, III, filed this case as an individual and class action race discrimination suit pursuant to 42 U.S.C. §§1981 and 1983, and 42 U.S.C. §2000(e) *et seq.* (Title VII of the Civil Rights Act of 1964). The persons listed as Petitioners in this Petition for Writ of Certiorari were named as Defendants in the Complaint. The Complaint sought declaratory and injunctive relief to restrain the Arkansas Department of Correction from engaging in alleged discriminatory employment practices. The Complaint further prayed for back pay for the individual and class Plaintiffs, and for other monetary damages.

The District Court conditionally certified the case as a class action by an Order dated September 27, 1976. By subsequent Order dated January 18, 1982, the Court defined the class as follows:

> All Black persons who have been employed by the defendant Department of Correction at any time from May 8, 1971 to the date of the commencement of the trial, who are or have been limited, classified, restricted, discharged or discriminated against by the defendants with respect to promotions, assignments, training or who have been otherwise deprived of employment opportunities related to said factors because of their race or color.

By Order dated March 22, 1982, the District Court subsequently amended the portion of its class designation reading "to the date of the commencement of the trial" to read "to the date of judgment, if any, entered on the question of liability." (See Appendix A at A-2, A-3; Appendix B at B-2).

The District Court determined that the case would be tried in a bifurcated manner, the first phase to deal solely

with the issue of liability. Following extensive discovery in pre-trial proceedings, the liability phase of the case was tried to the District Court over a period of fifteen (15) days between March 29, 1982 and April 28, 1982. The District Court issued its Opinion on August 29, 1983, in which it found that the named Defendants had not discriminated in initial hiring of blacks, but had unlawfully discriminated in job placement, promotions, and other employment practices. (See Appendix B at B-16).

The Petitioners herein appealed the decision of the District Court to the Eighth Circuit Court of Appeals, on the following grounds: that the District Court abused its discretion by certifying the case as a class action, or by failing to decertify the class at some point in the proceedings, because the Plaintiffs had failed to comply with the requirements of Rule 23; that the District Court erred by certifying a class which was entirely too broad, and by failing to narrow said class at some point in the proceedings, all in contradiction to current law pertaining to across-the-board classes as stated by this Court; that the District Court erred at law by applying the wrong legal standard to the facts in determining whether racial discrimination had occurred; that the District Court was clearly erroneous in its finding of discrimination because Plaintiffs had failed to prove a pattern or practice of discrimination. The Respondents herein filed a cross-appeal, claiming that black applicants who were not hired by the Department of Correction should have been included in the certified class by the District Court. On June 5, 1985, the Eighth Circuit Court of Appeals filed an Opinion in which it affirmed the judgment of the District Court in all respects. (See Appendix A).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S RULING THAT THE DISTRICT COURT WAS CORRECT IN CERTIFYING THE CASE AS A CLASS ACTION, IN REFUSING TO DECERTIFY THE CLASS, AND IN THE SCOPE AND BREADTH GIVEN TO THE CERTIFIED CLASS IS IN CONTRADICTION TO THIS COURT'S DECISIONS REGARDING CLASS ACTIONS.

An individual plaintiff seeking to maintain a class action under Title VII has the burden of establishing that the case is certifiable as a class action and that he meets the requirements of numerosity, commonality, typicality, and adequacy of representation specified in F.R.C.P. 23(a). *General Telephone Co. v. Falcon*, 457 U.S. 147 at 157 (1982). "[A]ctual, not presumed, conformity with Rule 23(a) remains, . . . indispensable." *Id.* at 160. The trial court is obliged to subject the proposed class to "rigorous analysis" and "to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Id* at 160-161.

The District Court certified this case as a class action without a hearing, and subsequently defined an across-the-board class in an order denying Petitioners' Motion to Decertify the Class. No hearing was conducted on decertification. The only evidence presented by Respondents in support of class certification was a two page affidavit by one of their attorneys, which simply parroted the provisions of Rule 23(a) itself. It is error for a trial court to presume that a plaintiff's claim is typical of other claims "without any specific presentation identifying the questions of law or fact that were common to the claims . . . of the members of the class he sought to represent." *Falcon, supra*, 457 U.S. at 158.

The Eighth Circuit Court of Appeals held that the District Court did not abuse its discretion in certifying this case as a class action without conducting a hearing to determine whether Plaintiffs met the requirements of Rule 23. The Court further held that the District Court did not abuse its discretion in failing to decertify the case as a class action at a later point in the proceedings. (See Appendix A at A-4). The District Court's actions and the Eighth Circuit's holding affirming such actions violate this Court's previous rulings in *Falcon* and other cases.

F.R.C.P. 23(a) requires that a plaintiff demonstrate: (1) that the proposed class is too numerous to join its members as parties; (2) that plaintiff's claims are common in law or fact to those in the class; (3) that plaintiff's claims are typical of absent class members; and (4) that plaintiff will adequately represent the class. In essense, "a class representative must be part of the class and possess the same interest and suffer the same injury as class members." *East Texas Motor Freight Systems, Inc. v. Roderiguez*, 431 U.S. 395 at 405 (1975) quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 at 216 (1971). The Plaintiffs in this case were non-supervisory, security officers at the Cummins Unit of the Arkansas Department of Correction during a portion of the years 1973-1974, who both resigned their employment. They asserted highly individualized claims of promotional and treatment discrimination. They have nothing in common with the class allegations concerning Department of Correction practices regarding hiring, discharge, non-security employees, supervisory employees, present employees, employees who preceded them, or employees employed at facilities other than Cummins. Without any specific presentation by Plaintiffs identifying questions of law or fact common to the claims asserted on behalf of the proposed class members, it was error for the District Court to certify the case as a class action. The Eighth Circuit Court of Appeals contradicted holdings of this Court in affirming said error. *See Falcon, supra*, 457 U.S. at 158.

Just as Plaintiffs failed to show commonality to the claims of the putative class, neither did they show that their claims were typical. Plaintiffs offered no pre-trial evidence that their claims were typical, other than the pleadings and their attorney's affidavit. Their testimony at trial indicated that their grievances were highly individualized. Where the Plaintiffs' grievances are highly individualized and reflect unique circumstances, the claims are not typical and no class should be certified. As this Court stated in *Falcon*, *supra*, 457 U.S. at 157:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and this otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Plaintiffs failed to bridge that gap in this case. The testimony regarding discrimination in their particular employment was insufficient to sustain the additional inference that there was a pattern or practice of racial discrimination in employment at the Department of Correction which was motivated by discriminatory animus. The Eighth Circuit erred in its affirmance of the District Court's continued certification of this case as a class action.

Plaintiffs also failed to show that they were adequate class representatives. In order to adequately represent the class, the class representative must have knowledge of and be familiar with the work environment of, the nature of the jobs held by, and the practices affecting the class members. Plaintiffs introduced no evidence prior to trial to show that they met this requirement. Furthermore, the evidence at trial showed that Plaintiffs had made only casual attempts to familiarize themselves with employment practices and

policies of the Department of Correction since 1974 or to follow the progress of the lawsuit, leaving virtually all the decisions to the discretion of their attorneys. Again, the Eighth Circuit Court of Appeals erred in affirming the District Court's certification of this case as a class action, in light of Plaintiffs' failure to comply with Rule 23.

The principle purpose of the class action is to advance the efficiency and economy of litigation. *Falcon, supra*, 457 U.S. at 155. The class action device is especially appropriate when the issues are common to all class members and when they turn on questions of law which are applicable in the same manner to each class member. *Id.* at 154. Under such circumstances a class action would serve its purpose by allowing issues affecting potentially every class member to be litigated in an economical fashion. *Id.* Testimony at trial indicated that the principal purpose of the class action device as stated in *Falcon* was not advanced in this case. There were not issues of fact or law common to the class. The individual Plaintiffs' claims were highly individualized and particular to their situation, and the other witness advanced a wide range of complaints covering virtually every aspect of the Department of Correction. Maintenance of this case as a class action did not advance the "efficiency and economy of litigation which is a principal purpose of the procedure." *Falcon, supra*, 457 U.S. at 159, quoting *American Pipe and Construction Company v. Utah*, 414 U.S. 538 at 553 (1974).

The District Court abused its discretion in certifying this case as a class action, and in failing to decertify the case as a class action at some point during the pendency of the proceedings. The Eighth Circuit's affirmance of the actions of the District Court violates the previous holdings of this Court. As stated in *Falcon, supra*, the initial designation of a case as a class action is "inherently tentative," and even after a judge has certified a case as a class action, the judge is free to decertify the class or to modify it based on the

evidence produced in the litigation. *See Falcon, supra*, 457 U.S. at 160. By initially certifying this case as a class action without requiring the Plaintiffs to make a showing of compliance with Rule 23, the District Court required Petitioners to defend against a scatter gun approach to the case by Plaintiffs. Additionally, during the pendency of the trial the Plaintiffs failed to show any commonality or typicality with the putitive class, thereby making it imperative upon the Court to decertify the class which it had earlier certified. The Eighth Circuit's affirmance of the District Court's actions is in contradiction to the law on class actions set forth by this Court.

Finally, even if this case were correctly certified as a class action, the scope of the class as certified by the District Court was an entirely too broad across-the-board class, of the sort condemned by this Court in the *Falcon* case. This Court noted in *Falcon* that even though suits alleging racial discrimination are often by their very nature situations involving class wide wrongs, simply because a plaintiff alleges that such discrimination has occurred "neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Falcon, supra*, 457 U.S. at 157. In its opinion in this case, the Eighth Circuit Court of Appeals stated:

> Finally, while the evidence supporting the finding of liability may have been less substantial with respect to some of the ADC facilities than others, that does not support a finding that the class was over broad. At the remedial phase of this lawsuit the District Court can cure any over broadness of the class which might exist by carefully scrutinizing the evidence then presented in light of the evidence already adduced, and tailoring the remedy as such that only those harmed by the discriminatory practices will be compensated. (See Appendix A at A-4).

The Court of Appeals improperly interpreted this Court's decision in the *Falcon* case by its upholding of the across-the-board class certification. This error is not cured by the statement that the trial court can remedy any over-broadness of the class by scrutinizing the evidence presented at the damages phase of the trial and tailoring its remedy in conformance therewith. This approach works an unfair prejudice against Petitioners and violates the law established by this Court. A claim presented by two individuals who were non-supervisory, security personnel at one unit of the prison system for a period of one year before voluntarily resigning, is not sufficient to represent a class alleged to contain persons with claims regarding hiring, discharge, non-security positions, supervisory positions, present employees, preceding employees, or employees employed at other units. The Eighth Circuit violated this Court's rulings when it affirmed the District Court's across-the-board class certification.

II.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE EIGHTH CIRCUIT HAS IMPROPERLY INTERPRETED THIS COURT'S DECISIONS IN AFFIRMING THE DISTRICT COURT'S ERRONEOUS APPLICATION OF THE LAW TO THE FACTS OF THE CASE.

A disparate treatment claim brought under Title VII turns on the basic issue of whether the employer *intentionally* treated some persons less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical in a disparate treatment case. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 335, n. 15 (1977). Title VII also prohibits employment practices that are neutral on their face but that in fact fall more harshly on one group than another, and have a disproportionate or disparate impact on that group, which cannot be justified by

business necessity. Proof of discriminatory motive is not required under a disparate impact theory. *Griggs v. Duke Power Co.*, 401 U.S. 424 at 430-431 (1971).

In the case below, Respondents presented allegations and testimony contending that Petitioners intentionally treated blacks different than whites in various aspects of the employment practices at the Department of Correction. In its Memorandum Opinion and Order the District Court discussed numerous findings related to alleged purposeful acts of Department of Correction authorities, such as subjective job assignments, shift assignments, and promotional decisions. Although the Court's findings dealt with issues which require some purposeful action on the part of Respondents, the Court based its finding of discrimination on a disparate impact analysis. For example, the Court found that the "subjectivity" of the wardens and others who controlled the promotion process had a disparate impact on blacks. The subjectivity of a promotional, discharge, or other employment process, which requires some purposeful or intentional activity on behalf of the employer, should be considered under a disparate treatment analysis rather than a disparate impact analysis.

In its Opinion, the Eighth Circuit Court of Appeals found that the District Court had properly employed the disparate impact model of analysis established in the *Griggs* case in rendering its decision regarding the class claim in this case. As such, the Court of Appeals has erroneously and improperly applied the *Griggs* decision. The *Griggs* case dealt with a typical disparate impact situation, where an employer was requiring an objective criteria of obtaining a high school education or passing a standardized general intelligence test as a condition of obtaining certain jobs. The *Griggs* analysis is not appropriate when considering a subjective promotional or other process affecting the conditions of employment.

The Eighth Circuit has previously recognized that the *Griggs* analysis is not appropriate when considering an employer's subjective employment practices. In *Harris v. Ford Motor Co.*, 651 F.2d 609 at 611 (8th Cir. 1981), the Eighth Circuit rejected a contention that an employer's practice of making "subjective" decisions in discharging employees for poor workmanship disproportionately impacted on women. The court held that while non-objective evaluation systems may be probative of intentional discrimination, subjective decision making systems are not the types of practices prohibited by the *Griggs* decision and cannot form the foundation for a finding of discriminatory impact under *Griggs* and its progeny.

By its opinion in the case at bar, the Court of Appeals not only erroneously applied the *Griggs* decision but also its own previous decision in the *Harris* case. The Court justifies its analysis by characterizing the case at bar as an "adverse impact 'excessive subjectivity' case," and cites as support for this characterization material from a leading treatise on employment discrimination law. This is not an adequate basis upon which to ignore the law established by this Court in the *Griggs* decision.

The District Court engaged in a confusing misapplication of the proper legal standard to the facts in reaching its decision. The Court of Appeals affirmed the District Court in its legal analysis, and in effect misapplied the previous holdings of this Court as discussed above.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the Eighth Circuit

Nos. 83-2320 and 83-2370

Johnny Jones and Huey Davis, III, et al.,	
Appellees/Cross-Appellants,	
v.	
	Appeals from the United States District Court for the Eastern District of Arkansas.
Terrell Don Hutto, Individually and as State Corrections Commissioner, A. L. Lockhart, Individually and as Superintendent of the Arkansas Department of Corrections—Cummins Unit, Jerry Campbell, Individually and as Assistant Superintendent of the Department of Corrections—Cummins Unit, Marshall N. Rush, W.L. Curry, Lynn Wade, Thomas Worthen and Richard Griffin, Individually and as members of the Board of Corrections of the Arkansas Department of Corrections,	
Appellants/Cross-Appellees.	

Submitted: April 10, 1985

Filed: June 5, 1985

Before ROSS and JOHN R. GIBSON, Circuit Judges, and COLLINSON,* District Judge.

ROSS, Circuit Judge.

This case comes before the court on appeal by the Arkansas Department of Corrections (hereinafter ADC) from the district court's [1] finding of liability in an employment discrimination class action suit filed by two former ADC employees. Jurisdiction is premised on 28 U.S.C. §1291. For the reasons stated herein we affirm.

FACTS

In May, 1974, two former employees of the ADC filed this lawsuit against the ADC alleging that the Department unlawfully discriminated against blacks in hiring, placement, promotions, and other employment practices. In January, 1976, the plaintiffs sought to have the case certified as a class action. By an order dated January 18, 1982, the district court certified the class as follows:

> All Black persons who have been employed by the defendant Department of Corrections at any time from May 8, 1971 to the date of the commencement of the trial, who are or have been limited, classified, restricted, discharged or discriminated against by the defendants with respect to promotions, assignments, training or who have been otherwise deprived of employment opportunities related to said factors because of their race or color.

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*The HONORABLE WILLIAM R. COLLINSON, Senior Judge, United States District Court for the Eastern and Western Districts of Missouri, sitting by designation.

1 The Honorable Oren Harris, Senior United States District Judge for the Eastern District of Arkansas.

Jones v. Hutto, No. PB-74-C-173 (E.D. Ark. January 18, 1982) (Order). [2]

After extensive discovery, trial commenced on March 29, 1982, and the case was tried over a period of fifteen days. The record in this case is voluminous, containing almost 4,000 pages of transcript, several hundred exhibits, as well as depositions. On August 29, 1983, the district court issued a cogent opinion which copiously analyzed the abundant evidence presented in this case. The court discerned that the ADC had unlawfully discriminated against blacks in placement, promotion, and other practices, but held there was no unlawful discrimination in the ADC's hiring practices. This appeal and cross-appeal followed.

ISSUES

A. Appeal

On appeal the ADC raises three issues:

1. Whether the Court abused its discretion by failing to decertify or narrow the class;

2. Whether the court was clearly erroneous in its ultimate finding of discrimination; and

3. Whether the court applied the correct legal standard to the evidence in this case.

B. Cross-Appeal

In their cross-appeal the plaintiffs claim that the district court erred by failing to include black applicants

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The district court subsequently amended the provision "to the date of the commencement of the trial," to read: "to the date of judgment, if any, entered on the question of liability." *Jones v. Hutto*, No. PB-74-C-173 (E.D. Ark. March 22, 1982) (Order).

who were denied employment in the class which was certified.

DISCUSSION

A. Class Certification

The appellants claim that the district court should have held a hearing to determine whether the plaintiffs' claims were sufficiently similar to those of the class members, and to limit the scope of the class to include "only non-supervisory security officers employed at the Cummins Unit during the term of plaintiffs' employment, who claim the same type of discrimination * * * ." Appellants' Brief at 8. The cross-appellants claim the court should have included applicants in the class. We reject both claims.

The certification of a class under Rule 23 of the Federal Rules of Civil Procedure may be overturned if the district court abused its discretion in so certifying the class. *See Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980). Nothing in the record in this case indicates that the court abused its discretion in certifying the class as it did. Furthermore, the district court had sufficient material before it to determine the nature of the allegations, and rule on compliance with Rule 23, without holding a formal evidentiary hearing. *See Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977). Finally, while the evidence supporting the finding of liability may have been less substantial with respect to some of the ADC facilities than others, that does not support a finding that the class was overbroad. At the remedial phase of this lawsuit the district court can cure any overbroadness of the class which might exist by carefully scrutinizing the evidence then presented in light of the evidence already adduced, and tailoring the remedy such that only those harmed by the discriminatory practices will be compensated.

B. Substantive Finding of Discrimination

The appellants claim that the district court erred in its factual findings which were relied upon to support the ultimate finding of liability. To support their position the ADC discusses at length the evidence in the record which demonstrates that certain black individuals were in fact promoted. In our opinion, the fact that not every black was discriminated against, or that there were exceptions, does not militate against the district court's finding of liability in this case. *See Bell v. Bolger*, 708 F.2d 1312, 1318 (8th Cir. 1983). The district court rejected this argument on the same basis as we reject it:

> The defendants attempted to demonstrate that blacks have progressed in the Department of Correction and that they are not underrepresented in supervisory positions. First, an employer cannot respond to a classwide showing of exclusion by identifying a few blacks who progressed in the system. The plaintiffs have readily conceded that this is not a situation where no black had ever been promoted. Rather, the discrimination lies not in total exclusion but rather in the Department's disproportionate allocation of promotions to whites. [That] * * * blacks * * * have progressed through the system hardly demonstrate[s] that no discrimination has existed.

Jones v. Hutto, No. PB-74-173, Slip op. at 27 (E.D. Ark. August 30, 1983).

In this case both parties had the opportunity to present evidence to the district court regarding their respective positions. The district court had the opportunity to observe the demeanor of the witnesses and weigh the conflicting evidence. There is substantial evidence in the record to support the court's factual determinations which formed the basis for the finding of liability. The Supreme Court recently reaffirmed that the clearly erroneous standard applies in cases such as this, *see Anderson v. City of*

Bessemer City, 105 S.Ct. 1504, 1511-12 (1985), and the record before us establishes that the district court's findings are not clearly erroneous. *Id. See also Tolliver v. Yeargan*, 728 F.2d 1076 (8th Cir. 1984). [3]

C. Proper Legal Standard

The ADC's final allegation is that the district court erroneously based its finding of liability as to the class on a disparate impact model while the testimony raised issues of disparate treatment.

As to the named plaintiffs' claims of discrimination, the court clearly employed the disparate treatment analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It is equally clear that the court employed the disparate impact model of analysis established in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), to the class claim in this case. This, however, was not error.

This case presented what is commonly referred to as an "adverse impact 'excessive subjectivity' case", where an employer's excessively subjective selection process results in an adverse impact upon a protected group. *See Schlei & Grossman, Employment Discrimination Law* 1288 (2d ed. 1983). "However characterized, disparate treatment

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The ADC also takes issue with the district court's discussion of past litigation involving segregation of inmates and prison conditions in general at the ADC. *See Finney v. Mabry*, 534 F.Supp. 1026 (E.D. Ark. 1982); *Finney v. Mabry*, 528 F.Supp. 567 (E.D. Ark. 1981); *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978); *Finney v. Hutto*, 410 F.Supp. 251 (E.D. Ark. 1976) *aff'd* 548 F.2d 740 (8th Cir. 1977); *Finney v. Hutto*, 505 F.2d 194 (8th Cir. 1974); *Holt v. Hutto*, 363 F.Supp. 194 (E.D. Ark. 1973); *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970), *aff'd in part, rev'd in part*, 442 F.2d 304 (8th Cir. 1971); *Holt v. Sarver*, 300 F.Supp. 825 (E.D. Ark. 1969). Those prior decisions do not appear to have formed the basis of the district court's decision, but they may have served as a valuable backdrop against which the ADC's employment policies could be viewed. This is not impermissible.

'pattern and practice' cases are factually and analytically indistinguishable from adverse impact 'excessive subjectivity' cases." *Id.* (footnotes omitted). As the evidence sufficiently supported both theories of liability in this case, liability could be premised on either theory. *See generally Kirby v. Colony Furniture Co.*, 613 F.2d 696, 702 & 705 (8th Cir. 1980).

As the appellants acknowledge, in addition to examining the specific disparate treatment claims of the named plaintiffs, the court received substantial testimony from other witnesses as to the "assignment of blacks to least desirable jobs; mistreatment and verbal abuse by white supervisors; arbitrary terminations of blacks for reasons for which whites are not terminated; submission of only white applicants to QRC and Legislative Council; subjective denials of promotions due to favoritism toward white applicants; and a multitude of other *intentional acts of discrimination.*" Appellant's Brief at 10 (emphasis added). Additionally, however, the court also relied on impact-type evidence to support his finding that the otherwise "neutral" subjective promotional policies of the ADC adversely affected blacks. [4] Specifically, the court found:

> Commissioner Lockhart also enumerated his criteria in evaluating employees for promotions: a person who is energetic, a person who can adapt to the institutional environment, a person who will go by policy and procedure, a person who will devote lots of time to the job, a person who is willing to learn and listen, a person who can be depended on in a crisis situation, a person who shows maturity with staff and inmates, a person you can trust in a time of trouble, a

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"In the excessive subjectivity case, plaintiffs do not challenge a specific employment practice but allege that the employer's total selection process (*which is analyzed as if it were a test or objective criterion*) allows excessive subjectivity which results in an adverse impact upon a protected group." Schlei & Grossman *Employment Discrimination Law* 1288 (2d ed. 1983) (emphasis added).

person you can depend on to aid a fellow staff person, and a person who would perform in a professional manner. Mr. Lockhart was not able to explain how these personality traits could be measured objectively, but indicated that you could observe these qualities by working with an individual.

* * *

In summary, the administrators and Wardens who controlled the promotion process were allowed to make subjective judgments and to bring to their selection their own personal philosophies concerning corrections. This has had a disparate impact upon blacks.

* * *

During the relevant time period, the defendants have used a variety of procedures available under state personnel guidelines to disproportionately benefit whites. The defendants followed the correct procedures but this does not insulate them from liability. By use of these procedures, opportunities were given to whites that were not given to blacks. In addition to the use of the substitution requests, the department brought in a number of employees at advanced steps. These employees were processed in accordance with state personnel procedures. In 1979, Commissioner Housewright made more than 25 such requests for individuals in grades 15 and above. Not one of those individuals was black.

* * *

The result of the defendants' practices is that white employees were generally hired into the department at higher grades than black employees. The evidence shows that for the entire period from 1973 to 1979 no black person was hired into the department above grade level 19. Black employees comprised only 5.4% of the employees hired into grade 16 and above and only 20.4% of those hired into grade 12 and above.

> More than 23% of all white males were hired into grade 12 and above while just under 8% of black males were hired into grade 12 and above. There can be no equal opportunity in employment when only whites are considered for either qualifications substitutions or advanced step placement.
>
> These employment practices are underscored by the evidence that there are several positions at the Department which have never been held by a black.

Jones v. Hutto, No. PB-74-173, Slip op. at 21-24 (E.D. Ark. August 30, 1983). Our reading of the record is consistent with the district court's. The evidence in this case clearly establishes that the subjective promotion practices had an adverse impact upon blacks. Furthermore, the neutral state personnel guidelines were employed in a manner that produced disparate impact upon black ADC employees Accordingly, we do not believe the court erred in its application of the law to the evidence in this case.

CONCLUSION

We have examined the appellants' remaining arguments in this case and find them to be without merit. We have also carefully examined the cross-appellants' claim that black applicants who were not hired should have been included in the certified class and do not find this to be an abuse of the trial court's discretion. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

In the United States District Court
Eastern District of Arkansas
Pine Bluff Division

Johnny Jones and Huey Davis, III, et al.,	)	
Plaintiffs,	)	
v.	)	
	)	No. PB-74-C-173
Terrell Don Hutto, Individually and as State Corrections Commissioner, A. L. Lockhart, Individually and as Superintendent of the Arkansas Department of Corrections—Cummins Unit, Jerry Campbell, Individually and as Assistant Superintendent of the Department of Corrections—Cummins Unit, Marshall N. Rush, W.L. Curry, Lynn Wade, Thomas Worthen and Richard Griffin, Individually and as members of the Board of Correction of the Arkansas Department of Corrections,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The complaint in this case was filed on May 8, 1974, by Johnny Jones and Huey Davis, III, invoking jurisdiction

under 42 U.S.C. §2000e et seq (Title VII of the Civil Rights Act of 1964) and 42 U.S.C. §§1981 and 1983. Named as defendants are the Commissioner of the Arkansas Department of Correction, a Superintendent of the Cummins Unit, an Assistant Superintendent, and members of the Board of Correction of the Arkansas Department of Correction. The case was brought as a class action and alleged a broad pattern of discrimination by the defendants on the basis of race. Allegations are made that Blacks are hired in token numbers into low paying jobs with little or no chance for advancement while Whites are accorded promotional opportunities in a disproportionate number. Further, Whites are given the opportunity to receive on-the-job training while Blacks are denied this opportunity. The alleged discriminatory practices of the defendants were generally outlined in paragraphs 24, 25 and 27 of the complaint.

The complaint sought a declaratory judgment and injunctive relief from the practices and policies of the defendant. In addition, the plaintiffs requested appropriate equitable relief and affirmative action, together with back pay and attorneys' fees consistent with the requirements of Title VII.

The Court conditionally certified the case as a class action by Order dated September 27, 1976. By subsequent Order dated, January 18, 1982, the Court defined the class as follows:

> All Black persons who have been employed by the defendant Department of Correction at any time from May 8, 1971 to the date of the commencement of the trial, who are or have been limited, classified, restricted, discharged or discriminated against by the defendants with respect to promotions, assignments, training or who have been otherwise deprived of employment opportunities related to said factors because of their race or color.

After extensive discovery and pre-trial proceedings, the matter was tried to the Court commencing March 29, 1982. In all, the trial lasted fifteen days with testimony concluding on April 28, 1982. The parties requested and the Court granted time to prepare and submit post-trial briefs. All proposed findings conclusions, briefs, and reply briefs have now been submitted to the Court for determination of the issues.

From the pleadings, the testimony and exhibits received in evidence, and in consideration of the proposed findings and conclusions and briefs presented in support thereof, the Court makes the following findings of fact and conclusions of law. These findings of fact and conclusions of law are incorporated herein pursuant to Rule 52 of the Federal Rules of Civil Procedure.

The individual plaintiffs are black citizens of the United States and were employees of the Arkansas Department of Correction at the time the lawsuit was filed. The Department of Correction is an employer within the definition of the 1964 Civil Rights Act, 42 U.S.C. §2000e. The Court, therefore, finds and concludes that it has jurisdiction of the parties and of the cause of action herein pursuant to 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1343 as to claims under 42 U.S.C. §§1981 and 1983.

The Board of Correction, which is composed of five members appointed by the Governor, is empowered to formulate general policies and practices with regard to employment by the Department of Correction. The Board must act within guidelines prescribed by the State Office of Personnel Management of the Department of Finance and Administration and is bound by the provisions of the Uniform Classification and Compensation Act. Ark. Stat. Ann. §12-3201 et seq. Directly below the Board is the position of Commissioner or Director. The Commissioner formulates policy for the Department, subject to the policies and procedures prescribed by the Board of Correction.

Most of the information concerning the operation of the department is communicated to the Board through the Commissioner. His duties include the employment of personnel needed for the administration of the Department and the promotion, discipline, suspension and discharge of personnel in accordance with Board policy.

Below the Commissioner is the position of Assistant Commissioner or Assistant Director. Until 1977, there was only one such position. In 1977, the Commissioner (James Mabry) instituted a tripartite Assistant Director system and divided the services provided by the Department among the three assistants. The system includes the Assistant Director for Special Services with jurisdiction over Probation and Parole. The jurisdiction of the Assistant Director for Administrative Services includes fiscal and personnel matters. The Assistant Director for Institutional Services has jurisdiction over the custodial facilities and wardens.

Most of the testimony and evidence at trial concerned practices within the jurisdiction of Institutional Services. This included the correctional institutions and was the focus of the prison conditions litigation. [1] There are eight major facilities maintained by the Department of Correction and six of these are under the jurisdiction of the Assistant Director for Institutional Services:

1. The Cummins Unit is the largest unit both in terms of personnel and inmates in the system. It houses the most serious and older male offenders and contains the

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Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); *Holt v. Sarver*, 309 F. Supp 362 (E.D. Ark. 1970), aff'd in part, rev'd in part, 442 F.2d 304 (8th *Cir. 1971); Holt v. Hutto*, 363 F.Supp. 194 (E.D. Ark. 1973); *Finney v. Hutto*, 505 F.2d 194 (8th Cir. 1974); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976); aff'd 548 F.2d 740 (8th Cir. 1977); *Finney v. Mabry*, 458 F.Supp. 720 (E.D. Ark. 1978); *Finney v. Mabry*, 528 F.Supp. 567 (E.D. Ark. 1981); *Finney v. Mabry*, 534 F.Supp. 1026 (E.D. Ark. 1982).

maximum security area. Cummins is located near Grady, Arkansas, in Lincoln County on a 16,000 acre farm. At the time of trial, some 16,043 inmates were housed at Cummins. Approximately 300 employees are authorized at Cummins.

2. The Tucker Unit is the Intermediate Reformatory and houses the less serious and younger male offenders. Tucker is located near Tucker, Arkansas, in Jefferson County on a 4,500 acre farm and is authorized to have approximately 125 employees.

3. The Women's Unit houses female offenders. It is located near Pine Bluff, Arkansas, in Jefferson County and is authorized to have approximately 65 employees.

4. The Diagnostic Unit contains the hospital and houses sick and injured inmates and some less serious offenders and acts as the reception center for the Department (except for females). It is located near Pine Bluff, Arkansas, in Jefferson County and is authorized to have approximately 65 employees.

5. The Benton Unit is a work release and pre-release facility. It is located near Benton, Arkansas, in Saline County and is authorized to have approximately 30 employees.

6. The Wrightsville Unit is a pre-release unit near Wrightsville, Arkansas, in Pulaski County and is authorized to have approximately 75 employees.

7. The Blytheville Unit is a work release facility. It is a small unit near Blytheville, Arkansas in Mississippi County.

8. The Booneville Unit is a farming operation and houses no inmates. It is located in Booneville, Arkansas, in Logan County.

The structure of each of the custodial units is essentially the same. Each unit is headed by a Warden who is also

referred to as a Superintendent. Wardens are somewhat autonomous within their units and have a tremendous impact on the character of that unit. Below the Warden is the Assistant Warden position. [2] Below Assistant Warden is the Major, [3] Chief of Security position. Below Major is the Captain or Correctional Officer IV (CO IV) position. Below Captain is the Lieutenant or Correctional Officer III (CO III) position. Below Lieutenant is the Sergeant or Correctional Officer II (CO II) position. The lowest [4] position is the Correctional Officer I (CO I).

Each position within the Department is assigned a numerical grade which conforms to State Personnel guidelines. Higher grades receive higher compensation. An employee who remains in the same position is periodically entitled to a "step increase" even though his grade is unchanged. An increase in step means higher compensation though not as much as an increase in grade. Grade increases are supposed to be based on merit while step increases are mainly a function of longevity of service.

During the course of this litigation, the grades associated with the correctional officer positions have changed as follows:

2

The units do not have the same number of Assistant Wardens. The Blytheville Unit has no assistants. The Women's Unit presently has no assistant although there has been one in the past and the unit is authorized to have one. The Cummins Unit began with two assistants and is presently authorized to have three.

3

In the Women's Unit, the Chief of Security is filling a Captain's slot. Cummins and Tucker have two Major's slots, one for the Building and one for the Field. The small units do not have Majors.

4

In the field the lowest officer is a correctional Officer II (Sergeant) although the individual has no supervisory authority over other correctional officers.

	CO I	CO II	CO III	CO IV	Chief of Security
1972-1974	10	12	14	15	17
1975-1979	11	12	15	17	18
1980-1982	13	15	17	18	19

Jobs within the Department may be broadly separated into two catgories: security positions and non-security positions. Security positions are those individuals responsible for the control and maintenance of inmates. Non-security positions would include support services such as laundry, mail room or kitchen. The majority of the employees in each unit are classified as security personnel.

There are two broad divisions within the security personnel classification: The Field Force and Building Security. The Field Force is responsible for inmates assigned to outside labor such as the "hoe squad." Officers assigned to the Field Force do not work in the building. These officers are armed and generally ride horses in performing their duties. Officers assigned to Building Security perform a variety of functions. Some of these officers work outside, but are still considered part of Building Security because their main function involves prisoners within the building. Tower guards, for example, are stationed in the lookout towers which surround the unit to guard against inmates leaving the unit. Similarly, officers assigned to the Rover or to one of the gates perform their duties outside the building. The officer in the Rover vehicle patrols the grounds surrounding the facility while the officer at a gate is responsible for individuals entering or leaving the prison grounds.

Within the building, there are three main types of assignments: Barracks, PBX and Yard Desk. An officer

assigned to one of the barracks is involved in immediate and personal contact with the inmates and is responsible for order and discipline within the building. The PBX is the communications center of the unit. Persons entering or leaving the building are processed through this position and communications between the units or within units are controlled from there. The Yard Desk is the operations center of the unit. The shift supervisor is stationed there and activity of both officers and inmates is monitored from this position.

The Department also maintains a central office which is responsible for administrative matters. There are approximately 100 employees in this sub-division. The Parole and Probation Division is responsible for the monitoring and counseling of recently released prisoners or prisoners eligible to be released and employs about 60 persons.

As previously indicated, the record in this case is quite extensive and while the case will be decided upon this record, the Court must note that this case did not arise in a vacuum. The Arkansas Department of Correction has been in litigation concerning prison conditions for more than a decade. [5] From the outset of that litigation, both the District Court and the Eighth Circuit Court of Appeals confronted and dealt with employment at the Department. A review of the prison conditions opinions is helpful in placing the instant case in perspective.

In *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970), [referred to as Holt II], Judge Henley found that the Arkansas prison system was controlled and operated in large part by the inmates. At that time there were almost 1000 inmates confined at Cummins; there were only 35 "free world" employees, eight of whom were available for guard duty. Judge Henley stated that a sentence to the Arkansas

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See footnote 1, supra.

Penitentiary amounted to a banishment from civilized society to a dark and evil world completely alien to the free world, a world administered by criminals under unwritten rules and customs completely foreign to free world culture. *Holt v. Sarver*, supra at 381. The Department was ordered to replace those trustees serving as guards with free world personnel. Thus, began the monitoring of employment at the Department of Correction.

In *Holt v. Hutto*, 363 F. Supp 194, 205 (E.D. Ark. 1973), (Referred to as Holt III), employment of free world personnel was again confronted by Judge Henley. Again, this was in the context of the constitutional requirement of a desegregated prison.

> . . . And it should be obvious that apart from any question of constitutional law black inmates will make a better adjustment to prison life and will conform better to prison routine and requirements if they believe affirmatively that members of their race are being treated fairly and without discrimination on account of race.
>
> The Court's previous decrees will be supplemented so as to enjoin racial discrimination in any form and in all areas of prison life . . . .
>
> To start with, existing prison rules about employee language should be enforced rigorously and higher echelon personnel should set an example to their subordinates . . . .
>
> Third, and this is extremely important, more black employees should be recruited, and blacks should be assigned to meaningful positions of authority, including assignments to Classification and Disciplinary Committees . . . .
>
> . . . The Court realizes that qualified blacks who are willing to fill positions of responsibility and authority in prison administration may be in short supply . . . . But, the difficulty of hiring qualified blacks should certainly not deter respondents from trying to do so.

Holt III was appealed to the Eighth Circuit Court of Appeals. *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 210 (8th Cir. 1974). [Referred to as Finney I]. Judge Lay, writing for the majority, noted that when the litigation began in 1970 racial discrimination was a serious problem within all the institutions operated by the Arkansas Board of Correction. The Court found that the District Court opinion fell short of its intended goal.

> Very little has been accomplished in the recruitment of black employees. Those who have been hired assume, with slight exception, no position of control influence or even persuasion. Resources, according to Commissioner Hutto, will not permit offering salaries sufficient to attract the qualified individuals he seeks. We need only repeat that inadequate resources cannot justify the imposition of constitutionally prohibited treatment. Even assuming qualified blacks cannot be found, we are not persuaded that an alternative such as establishing a program in which blacks could be trained until qualified is not viable.
>
> On remand the district court should amend its decree to include an affirmative program directed toward the elimination of all forms of racial discrimination. In doing so it should consider the standards now employed in the hiring and promotion of prison personnel. The court must assure itself that those standards are reasonably related to proper correctional goals and not designed to preserve institutional racial discrimination.

The Court of Appeals remanded the case to the District Court for further evidentiary hearings. The Court found the Arkansas correctional system to be unconstitutional.

On remand, the District Court, Judge Henley sitting by designation, again considered race relations within the prison system. *Finney v. Hutto*, 410 F. Supp. 251, 265-68 (E.D. Ark. 1976).

Negroes in Arkansas are in a substantial minority when compared with the population of the State as a whole. In the Department of Correction, however, black inmates make up nearly one-half of the total prison population and have done so for as long as this court has been familiar with the Arkansas prison system.

Administration of the Department, on the other hand, is clearly under the control of white people. Although in recent years the Department has employed a substantial number of blacks and is trying to hire more, a large majority of the employees are white, and Negroes occupying positions of any real authority are very few indeed.

Regardless of the fact that at Cummins, and presumably at Tucker as well, one finds a number of black employees bearing titles such as Captain, Lieutenant or Sergeant, it appears to the court that the only black person who occupies a position of any real authority in the administration of the prison system is Ms. Helen Carruthers, the Superintendent of the Women's Reformatory . . . .

In Holt III the court found that race relations in the Department were bad, to say the least, and the Court of Appeals certainly did not disagree with that finding. [Citation omitted].

Most of what the court had to say in Holt III by way of criticism of the Department in the field of race relations is still valid today, . . . While conditions in the Department have probably improved somewhat over the last two years and several months, the court finds that in spite of Departmental regulations and memoranda designed to improve race relations and to eliminate or mitigate the effects of poor race relations, the relations between whites and blacks are still bad at both Cummins and Tucker, particularly at the former institution. And the court further finds that the poor relations are still due to the factors that the court found causative in Holt III, namely a paucity of blacks in positions of real authority that are meaningful to inmates in

their day to day prison life, . . . and the poor quality and lack of professionalism of the lower echelons of prison employees who are in close and abrasive contact with inmates every day . . . .

This is not a fair employment practices case. The question is not whether the Department is discriminating against blacks in matters of hirings, promotions, or discharges, but whether the recruitment and promotional policies of the Department are designed to correct or alleviate the racial imbalance of the Department's staff which has contributed so much to the difficulties that the Department has had in the area now under consideration.

What the Department needs to do is not to hire people without regard to race but to make a conscious effort to hire qualified blacks in additional numbers and to place them in positions in the institutions which will enable them to exercise some real authority and influence in the aspects of prison life with which black inmates are primarily concerned.

The Department needs more blacks who are in positions that will entitled them to sit on classification committees and on disciplinary panels, to counsel with inmates about their problems, and to supervise inmates while at work . . . .

There is no constitutional objection, of course, to the Department's using the ESD as a referring service, but the exclusive use of that agency is not apt to produce applicants the hiring of whom will meet the Department's need to correct the existing racial imbalance of the staff.

The court recognizes, as it has recognized in the past, that it is difficult to recruit blacks who are qualified and willing to hold responsible positions in the Department; a number of factors are involved, including the rural location of the prisons. But the court is not satisfied that Commissioner Hutto and others

> connected with prison personnel have really exerted themselves to the fullest extent possible or have exhausted their resources as far as hiring responsible blacks is concerned.
>
> There is nothing to indicate that the Department's need in this connection has been made known to the black population in Arkansas through advertising or otherwise, or that anyone connected with the Department has sought to enlist the good offices of the University of Arkansas at Pine Bluff, which is a predominately black institution of higher learning and which used to be an all black college, or that help has been sought from such agencies or organizations as the Urban League or the National Association for the Advancement of Colored People, or from any governmental agencies concerned with the welfare of minorities.

In 1978, a Consent Decree was entered in *Finney v. Mabry*, 458 F. Supp. 720 (E.D. Ark. 1978). This decree contained specific agreements between the parties as to an affirmative action program for the recruitment and promotion of blacks to decision-making positions within the Department.

> . . . The following mechanism will be employed to carry out this obligation.
>
> (1) The immediate assessment of all Black employees of the ADC for promotions to vacant positions of authority.
>
> (2) The continuation of a personnel office within the ADC.
>
> (3) The establishment of an employment referral service with the Urban League of Greater Little Rock.
>
> (4) Listing of all job vacancies with the Placement Office of the University of Arkansas at Pine Bluff.

(5) Continuation of the ADC's present policy of hiring personnel, regardless of race.

Judge Eisele in *Finney v. Mabry*, 534 F. Supp. 1026, 1043-1045, (E.D. Ark. 1982) found the Department not to be in compliance with previous Court Orders, the Consent Decree and the Constitution with regards to the affirmative action program.

> The implementation of the affirmative action program is a more complex issue with which to deal. This is not an employment discrimination case where the court is interested in testing, and remedying if necessary, possible discrimination against blacks by the respondents in their hiring practices. The reason the affirmative action program is so important is not to benefit potential employees of the department, although they are directly benefitted. Rather, the importance is in obtaining a racial mix of the security personnel in order to alleviate feelings by black inmates, which are approximately half of the inmate population, that they are being discriminated against. The primary effort must be to hire qualified blacks and place them in positions of authority in all aspects of prison life.
>
> The evidence demonstrated that the respondents have increased their efforts to recruit qualified black persons to work within the department. Those efforts have been successful to the extent that blacks are well represented among the highest and the lowest ranking officers. In fact, it was shown that at the time of the hearing 53 percent of the correctional officers, the lowest level officers, were black. However, there have not been, and still are not, blacks in the middle management positions in significant numbers . . .
>
> . . . However, the Court finds it difficult to understand, with a pool of black persons for potential advancement as high as 50 percent of the relevant work force, why greater efforts at selection and training

> would not result in promotion and retention of a greater number of blacks.
>
> . . . However, the respondents must know that blacks, as previously ordered, must be employed in reasonable numbers at all levels of free-world personnel.

The District Court found the Department of Correction to be in full compliance with the Constitution and previous Court Orders in August, 1982 and dismissed the litigation. It marked the end of more than a decade of litigation involving prison conditions. In its final opinion, the District Court stated, "The affirmative action program for hiring and promoting women and minorities as free-world personnel, especially into mid-level management positions, is another area where the results accomplished have fallen somewhat short of expectations." *Finney v. Mabry*, 546 F. Supp. 628 (E.D. Ark. 1982). The Court further noted that the concern in the case was not with the rights of minority and female employees, but rather with the rights of the inmate class to have an appropriate racial and sexual mix in the administrators of the system. This difference in focus greatly affected the standard for evaluating the affirmative action program of the Department.

This Court, however, is directly concerned with the rights of minority employees and its focus is on whether their constitutional right to equal opportunities in employment have been violated. After careful review of the record in this case, the Court must conclude that there has been discrimination in employment at the Arkansas Department of Correction.

As indicated by Judge Eisele in his dismissal of the prison conditions litigation, the Department of Correction has come a long way since Judge Henley first described it as a dark and evil world. The various prison institutions are

being run by free world personnel. Blacks have been hired and in 1980 comprised 31.2% of this free world workforce; at the time of trial, blacks comprised 34% of the workforce at the department. The Court has concluded there is no discrimination in initial hiring; blacks are hired at the Department of Correction in proportion to their number in the Pine Bluff Area. It is a different story, however, with initial placement and promotions.

Blacks are invariably hired as CO I's and most remain in that position. They are not promoted in proportion to their numbers within the workforce. Further, they are assigned to the least desirable shifts and jobs at the Department, that being the evening and night shifts and Tower duty. Blacks are especially overrepresented on the night shift. Testimony at trial indicated that not only are these shifts the least desirable, but also do not allow an employee to gain experience deemed valuable when being considered for promotions. Commissioner Lockhart testified that when evaluating employees for promotion he looked to their experience within the Department. He stated that someone who had only worked at night and in the Tower would not be rated as highly as someone who had had direct contact with inmates during the day.

With promotions, it is abundantly clear from the testimony and the evidence introduced at trial, that blacks must be overqualified through either experience and/or education to receive a promotion. Whites are routinely promoted without the stated qualifications and are allowed extensive periods of on-the-job training. Jerry Campbell, Warden at the Tucker Unit, came to the Department of Correction in 1972 as a Personnel and Training Officer. He had a Bachelor's Degree in Physical Education and had worked as a junior high and high school football coach, an insurance salesman and a management trainee. When hired as the Personnel and Training Officer, Campbell admitted that he did not meet the stated requirements for the position. He did not have the appropriate degree nor did he

have any correctional experience. He readily admitted that he received on-the-job training. After less than a year with the Department, Campbell became the Assistant Warden at the Tucker Unit. Again, Campbell admitted that he did not have the educational or experience requirement for the position and had to be trained on-the-job. Campbell has advanced within the department and has served as both a Warden at Cummins and Tucker. The Court does not mean to imply that Campbell has not been an excellent and hard working employee. However, there is no evidence that any black has ever been given the same kind of opportunity to receive on-the-job training and be advanced to this degree.

Warden Campbell is not the only example of a white who has been placed and promoted to positions for which they were not initially qualified. Charles E. "Lefty" Thomas has held many positions in the Department including Personnel Director. He was made an Assistant Warden at Tucker in 1978 even though he had no custodial experience. He experienced severe difficulties in doing the job but was retained and allowed to gain the requisite experience to handle the job. In 1982, he was promoted to Warden at the Benton Unit. Jerry Gassaway came to the Department in 1973 as a Secretary. After four and one-half years as a Secretary and with no custodial experience, she was made Captain at the Women's Unit. It was admitted that she was not qualified for the position and was given on-the-job training. Tim Baltz, a disc jockey, joined the Department in 1974 as the Public Information Officer and Special Assistant to the Commissioner in charge of Public Affairs. In 1982, he was made an Assistant Warden. Larry Norris had experience as a nurse, phlebotamist and oven worker. He was hired in 1976 as a CO IV. In 1977, he was promoted to Assistant Warden even though he had no custodial experience. Again, the Court does not wish in anyway to diminish the work these people have done at the department, but blacks have not been afforded the same opportunity to receive on-the-job training. Those blacks who have been promoted have worked themselves up

through the ranks and have had to be overqualified for the positions they finally received.

Rodney Croseford, a black male, applied for the position of Garden Supervisor. He had completed four years at the University of Arkansas at Pine Bluff with a Major in Agronomy. He lacked ten elective hours to complete his degree. In his interview with Art Davis, the Farm Administrator, he was told he was qualified for the job but was told his best chance would be to start as a CO I because the Department had a policy of promoting from within. While he was a CO I, the Garden Supervisor position remained open and he reapplied for the position. He was then the only applicant. Later a co-worker was hired. This white co-worker, Grimes, was told to apply by the Promotion Board. He did not have as much training or experience as Croseford.

Cleophus Montgomery, Jr., a black male, was employed by the Department in 1972 as a CO I. At the time of his resignation in 1981, he was a Lieutenant. He had applied for a Captain's position on two occasions but had not been selected. Each time, a white with less custodial experience was selected. Montgomery resigned and took a position with the Federal prison system. He testified that he simply saw no future with the Arkansas Department of Correction.

Bruce Collins, a black male with a Bachelor of Science degree, has been employed at the Department since 1972. He began with the Department as a CO I and has advanced through the ranks to become an Assistant Warden at the Wrightsville Unit. In the ten years it has taken him to progress to Assistant Warden, Collins has had to endure the racial slurs of fellow officers. Yet he has learned about all aspects of the prison area. He has had experience in administration and in corrections. He has had training in transactional analysis and inmate psychology. Despite his qualifications, Collins was not selected for the Warden position at Wrightsville Unit. The white individual selected

for the position had been a superintendent in the Construction area. Although Collins would not claim discrimination, he readily stated that he was better qualified in both correctional and administrative experience than the white employee chosen.

The selection process within the Department has been changed over the years. Initially, the Personnel Department of the Department of Correction reported directly to the Commissioner. The Wardens had almost complete control over promotional decisions. Except for Ms. Corrothers, Warden of the Women's Unit, all individuals with authority to make decisions were white, including Wardens, Assistant Wardens, Treatment Coordinators, Personnel Officers, Majors and Captains. There were no written guidelines concerning promotion criteria and no check on the system. In 1974, the promotion board policy was set up at the units. The purpose of the boards was to allow for a group interview rather than the subjective impression of one individual, the Warden.

Two types of promotion boards were instituted. For promotions to grade thirteen and above, interviews would be held at the central office. These were called "Departmental Promotion Boards." Members of these boards served three months and were appointed by the central Personnel Officers. The boards would make recommendations to the Commissioner concerning the most qualified candidate. If the commissioner did not accept the recommendation of a board he could ask that the board be held again and more applicants solicited. As in all decisions, the Commissioner had the ultimate responsibility for the composition of the boards as well as their selections.

Promotions to grade twelve (a Correctional Officer II was a grade 12) and below were handled at the respective units and were called "Unit Promotion Boards." Unit board members were selected by the Wardens and changed for

each promotion. [6] Ultimate responsibility for these boards, however, also resided in the Commissioner.

In 1979 Acting Commissioner Lockhart eliminated the promotion board policy because unit personnel (i.e., Wardens, Assistant Wardens, etc.) did not have enough input into the promotion process. Thereafter, all applicants for promotion would be screened and rank-ordered by the personnel office. If there were ten or fewer applicants, the top three candidates were to be submitted to the Warden or department head for selection. If there were more than ten applicants, five names were referred.

There have never been written criteria to instruct either the promotion boards or the Wardens in how to make promotion decisions. Mr. Campbell, for example, admitted that he never received training in what to look for in promoting an individual and utilized his own personal, subjective judgment in determining who should be promoted. Mr. Campbell said that he would not start with the job specifications showing minimum state qualifications but instead attempted to find the right person to do the job. He testified that he might look at a person's education, depending on the job. Mr. Campbell, who has been Warden and Assistant Warden at both Cummins and Tucker, then proceeded to enumerate the qualities he looked for in selecting an individual to promote. These included leadership ability, self-confidence, someone looking for a career in corrections, the person's knowledge about what is going on, the respect the person had from others, the way the person dealt with inmates and officers, the person's pride in being in corrections. Campbell had difficulty

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Wardens would sometimes allow their secretaries to sit on boards as their representatives. These secretaries, all of whom were white, had no training in personnel or employee selection and were given no guidelines in determining which employees should be promoted.

explaining the meaning of these criteria and conceded that some subjective judgment was involved.

Commissioner Lockhart also enumerated his criteria in evaluating employees for promotions: a person who is energetic, a person who can adapt to the institutional environment, a person who will go by policy and procedure, a person who will devote lots of time to the job, a person who is willing to learn and listen, a person who can be depended on in a crisis situation, a person who shows maturity with staff and inmates, a person you can trust in a time of trouble, a person you can depend on to aid a fellow staff person, and a person who would perform in a professional manner. Mr. Lockhart was not able to explain how these personality traits could be measured objectively but indicated that you could observe these qualities by working with an individual.

Willis Sargent, the present Warden at Cummins, testified he relied heavily on attitude. Warden Sargent feels that a person going into the supervisory ranks has to have a positive attitude towards those he is supervising. When he considers a prospective promotee he looks in the record for attitude problems. Warden Sargent admitted that it was hard to explain but that attitude was a combination of the whole person. He further suggested that you can tell attitude from talking to a person and that such a judgment is made by being around people.

In summary, the administrators and Wardens who controlled the promotion process were allowed to make subjective judgments and to bring to their selection their own personal philosophies concerning corrections. This has had a disparate impact upon blacks.

All jobs at the Department of Correction are bound by the provisions of the Uniform Classification and Compensation Act. An individual who applies for a job must

meet the requirements listed in the job description for that particular job. If an employee or applicant does not meet the stated qualifications outlined in the job descriptions, the Department could substitute additional education over that required by the description for a portion of the experience and vice versa. This substitution must be approved by the Qualifications Review Committee.[7] The defendants have argued that once a person has been approved by this Committee, he or she is "qualified". The point, however, is that very few if any substitution requests have been made for blacks. This process was used almost exclusively to qualify whites. Aundra Thornton, a black female employee in the Department's personnel office, testified that she had not processed any substitution requests for blacks. At the time of trial, Hayward Battle was the Personnel Director for the Department. He testified that during his tenure there had been only seven requests for qualification substitutions, but all seven of them were for white individuals. As was demonstrated overwhelmingly by the evidence, at the same time that the defendants were telling the courts in the prison conditions litigation that there were not enough qualified blacks to hire or promote based on the job descriptions, they were making extraordinary efforts to qualify whites who did not meet the job descriptions.

During the relevant time period, the defendants have used a variety of procedures available under state personnel guidelines to disproportionately benefit whites. The defendants followed the correct procedures but this does not insulate them from liability. By use of these procedures, opportunities were given to whites that were

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This is a Committee which is set up through the Office of Personnel Management of the Department of Finance and Administration. Ark. Stat. Ann. §12-3206. The qualifications Review Committee is given the responsibility of reviewing the qualifications of applicants whose education and experience do not meet that required by the class specification, but who have other job related qualifications which might be validly substituted for the class requirements.

not given to blacks. In addition to the use of the substitution requests, the department brought in a number of employees at advanced steps. These employees were processed in accordance with state personnel procedures. In 1979, Commissioner Housewright made more than 25 such requests for individuals in grades 15 and above. Not one of those individuals was black. Mr. Sherman Tate, who was the State Personnel Administrator from 1977 to 1980, testified that there was much concern about Mr. Housewright's practices. Mr. Embree, the Personnel Director for the Department of Correction at that time, testified that he discussed with Mr. Housewright the EEO implications of bringing in all those whites.

The result of the defendants' practices is that white employees were generally hired into the department at higher grades than black employees. The evidence shows that for the entire period from 1973 to 1979 no black person was hired into the department above grade level 19. Black employees comprised only 5.4% of the employees hired into grade 16 and above and only 20.4% of those hired into grade 12 and above. More than 23% of all white males were hired into grade 12 and above while just under 8% of black males were hired into grade 12 and above. There can be no equal opportunity in employment when only whites are considered for either qualifications substitutions or advanced step placement.

These employment practices are underscored by the evidence that there are several positions at the Department which have never been held by a black. At the time of trial, there had never been a black Treatment Coordinator, Records Supervisor, Farm Manager, Correctional Administrator or Personnel and Training Officer. As late as August 26, 1977, there were at least thirty-five positions which had not been held by a black individual.

It is well-established that Title VII of the Civil Rights Act of 1964 and Sections 1981 and 1983 of 42 U.S.C.

proscribe employment practices and procedures which, although neutral on their face, have a disproportionate impact on blacks. *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Hameed v. International Association of Bridge, Structural and Ornamental and Iron Workers, Local Union NO. 396*, 637 F.2d 506 (8th Cir. 1980); *Kirby v. Colony Furniture Co., Inc.*, 613 F.2d 696 (8th Cir. 1980); "Criteria which disproportionately exclude one racial group are 'used' to discriminate within the meaning of the Act unless the user can show a business necessity for their use." *Hameed*, supra, at 512. Plaintiff is not required to show discriminatory intent or lack of good faith on the part of the employer:

> As set out by the Court in *Griggs v. Duke Power Co.* to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality "operated to exclude Negroes." Once the plaintiff has established the disparate impact of the practice, the burden shifts to the employer to show that the practice has a "manifest relationship to the employment in question." The "touchstone is business necessity" and the practice "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."

Furnco Construction Co. v. Waters, supra at 583.

The defendant's burden of proving a "business necessity" is a heavy one. The challenged practice or procedure must be justified by more than "routine business considerations." There must be "a *compelling need* for the employer to maintain that practice" and the employer must prove that "there is no alternative to the challenged practice." *Kirby*, supra at 705, n.6. As the Eighth Circuit held in *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 365 (8th Cir. 1972):

> The business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In establishing the disparate impact of the employer's practices, the plaintiff may rely on statistical compilations. *Teamsters*, supra; *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Kirby*, supra; *Green v. Missouri Pacific Railroad Co.*, 423 F.2d 1290 (8th Cir. 1975); The Eight Circuit has indicated that "a disproportionate racial impact may be established statistically in any of three ways." *Green*, supra at 1293. The first method announced by the Court was to consider "whether blacks as a class (or at least blacks in a specified geographical area) are excluded by the employment practices in question at a substantially higher rate than whites." *Id.* This is the method generally applied when the employer imposes a requirement such as education or experience on employees or applicants for employment.

The Court is of the opinion the plaintiffs have made a prima facie case of disparate impact with regard to the promotional and placement practices at the Department of Correction. Once the plaintiffs established this prima facie case, the burden of producing evidence to show the challenged is justified by business necessity shifts to the defendant. *Kirby*, supra at 703. The Court is of the opinion the defendant has not articulated a business necessity for its practices. No manifest relationship to the employment in question nor that the practice is necessary to safe and efficient job performance has been presented to the Court.

The defendants attempted to demonstrate that blacks have progressed in the Department of Correction and that

they are not underrepresented in supervisory positions. First, an employer cannot respond to a classwide showing of exclusion by identifying a few blacks who progressed in the system. The plaintiffs have readily conceded that this is not a situation where no black had ever been promoted. Rather, the discrimination lies not in total exclusion but rather in the Department's disproportionate allocation of promotions to whites. The eleven blacks who have progressed through the system hardly demonstrate that no discrimination has existed.

Secondly, the defendants attempted through the use of statistics to produce evidence that blacks were represented in supervisory positions in relationship to their number in the workforce. The statistics utilized by the defendants covered a period of May 27, 1978 through March 31, 1982. The actionable period begins May 8, 1971. Further, the statistics with regard to promotions are extremely misleading. The defendants' expert counted as a promotion every individual who completed the two or three week Training Academy. While an employee who completes this program receives a grade increase, this is automatic and non-competitive. The inclusion of these individuals camouflages the Department's failure to promote blacks to positions beyond the entry level.

The defendants' expert, Dr. Robert Baker, further claimed that his analysis showed that blacks were not underrepresented at the CO II level and above. However, on cross-examination, the expert admitted that his conclusion was based on an erroneous assumption: the expert assumed that all individuals without a high school degree were hired into grade 11 or below. Because of this error, the expert used an incorrect benchmark. He used the weighted percentage of blacks with a high school diploma in the outside workforce. However, almost all the blacks within the Department's workforce were high school graduates. The appropriate comparison is to the percentage of blacks in the workforce (30%) and not to the percentage

of blacks with high school degrees in the outside workforce (19%). The Court cannot accept the conclusions drawn by the expert proffered by the defendants. [8]

The Court can only conclude that the defenants have failed to produce evidence to rebut the prima facie case of the plaintiffs. They have not articulated a business necessity for the employment practices utilized by the Department of Correction.

The Court must note at this time that it is fully cognizant of the pressure the Department of Correction and its administrators have faced over the past few years. The need to obtain competent help with severe budgetary problems has been almost overwhelming. In the struggle to meet whichever problem is most severe at a particular instant, the department has utilized procedures allowed by state personnel but these have had a disparate impact upon blacks. In reaching this result, the Court wishes to emphasize that it recognizes the hurculean efforts made by the department over the last decade.

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The Court would also note here that in answer to an Interrogatory propounded by the plaintiffs' counsel, the defendants responded that they did not intend to call an expert witness. The Interrogatories were deemed continuing. On January 1, 1981, the defendants' pre-trial information sheet was filed. No expert witness was denoted. An amended pre-trial information sheet was filed on March 26, 1982, some three days prior to the commencement of trial. Robert Baker was listed as a witness but was not listed as either an expert nor was his professional degree noted. The nature of his testimony was not given. Local Rule 21 of the District Courts of the Eastern and Western Districts of Arkansas requires that expert witnesses and the nature of their testimony be included on the pre-trial information sheet. Further, the failure to notify the plaintiffs of the intention to call an expert witness certainly violates the spirit of Rules 26(b)(4)(A)(i) and 26(e)(1) of the Federal Rules of Civil Procedure. The Court is of the opinion that even if the testimony of Dr. Baker was probative, it would have to be excluded due to the failure of counsel for the defendant to apprise the plaintiffs of his intention to call an expert. The Court sees this as a deliberate attempt to avoid legitimate discovery.

There was much testimony at trial concerning the use of racial epiteths. Several witnesses, including A.L. Lockhart, Ronald Dobbs, and Bruce Collins, stated that despite department policy prohibiting the use of racial slurs they were sometimes used by prison employees. The Court is convinced there has been a diligent effort to eliminate this as a problem. This effort must continue. All individuals must be able to work in an atmosphere which is free from the use of racial epithets.

Further, there was much testimony concerning disciplinaries and terminations within the department. Several witnesses stated that their personnel file contained warnings or reprimands which they had never seen. This has apparently been a problem for some time. Edwin Evans, one of the first black employees of the department, testified that he found false reports in his personnel file. These had been placed there by a supervisor. Then Warden Lockhart, had them removed. Evans testified that if it had not been for Lockhart they would have remained in there. Warden Campbell stated that he has instituted the practice of having an employee sign any disciplinary which was being placed in his file. The Court finds this to be a good practice and should be instituted throughout the department.

The Court would also note at this juncture that it appears that many of the problems faced by black individuals, especially in the early 1970's, were caused by a few white supervisors. These supervisors are no longer with the department. There is no evidence in the record that present administrators knew of the problems or acquiesced in the treatment of subordinate black employees.

INDIVIDUAL CLAIMS

Johnny Jones

Jones, a black male with a degree in Sociology from UAPB, was initially employed at the Department of

Correction in July, 1973 as a prison guard, CO I. Prior to that time, Jones has applied for a parole officer position, but was not hired. During his employment, Jones also applied for a total of four other upper level positions, but was not chosen on any of his applications.

In November, 1973, Jones applied for the position of Treatment Coordinator. The vacancy announcement stated that a degree in Sociology or related experience was required. Roger McLemore, a white male with less than two years of college was selected. The evidence at trial showed that Warden Campbell told McLemore to apply for the job, sat on the promotion board and selected McLemore for the position.

The plaintiff, in an individual case of discrimination, has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. The plaintiff must show his qualifications to be equal to or greater than the one selected. An employer has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff made a prima facie case that he was equal to or better qualified than Roger McLemore for the position of Treatment Coordinator.

The defendants articulated a legitimate reason for his non-selection, that the selectee was better qualified. It was asserted at trial that McLemore was better qualified for the position because he had more security experience. The Court would note that McLemore had field security experience and not building security experience. The Court is of the opinion the reason articulated by the defendants is pre-textual. The Court can only conclude Jones was not promoted to the Treatment Coordinator position due to his race.

Huey Davis, III

Huey Davis, a black male with a BS degree in Sociology, served in the Army for three years as a neuropsychiatric technician. This job required that he do intake histories, supervise other technicians and be able to do routine medical tasks such as administer shots, diagnose illness, dispense medication, suture wounds and generally serve as an independent medical officer. He had medical training in the Army.

Davis was hired in October, 1973, by the Department of Correction as a Medical Assistant, Correctional Officer I. Prior to that time, he had applied at the department for the position of medical assistant (CO II), but was not hired. The supervisor selected a white male with less education but who had served as a navy corpsman. The plaintiff has established a prima facie case of discrimination.

The supervisor testified that he felt navy corpsmen were better trained and qualified. The supervisor testified that he believed a navy corpsman was always a better choice. There is no indication in the record that the qualifications of Mr. Davis and the other applicant were compared. The Court does not believe that one can automatically assume that a navy corpsman is better qualified. The Court is of the opinion this articulated reason is pre-textual.

As previously stated, the Court conditionally certified this case as a class action. The Court is of the opinion the class action has been sustained.

This case has been bifurcated. During Stage II proceedings members of the class must be identified, the individual relief to which they are entitled must be determined, and appropriate class relief considered and determined. The parties are directed to proceed forthwith, in the light of the foregoing findings and conclusions, with

prompt preparation for a hearing in connection with Stage II of this litigation.

As settlements by mutual agreement are encouraged in Title VII proceedings, the parties are urged to engage in good faith discussion of possible stipulation and settlement of the Stage II proceedings, and are directed to report to the Court on the progress of preparation and settlement negotiations within 90 days of the entry of this opinion.

This opinion and order are final for purposes of determining liability and should be considered a final decision.

IT IS SO ORDERED this 29th day of August, 1983.

/s/ Oren Harris
United States District Judge